Supreme Court, U.S.
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No. 95-1473

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

PRAXAIR, INC.,

Petitioner,

v.

FLORIDA POWER & LIGHT COMPANY and
FLORIDA POWER CORPORATION,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF FOR RESPONDENT FLORIDA POWER & LIGHT COMPANY IN OPPOSITION

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QUESTION PRESENTED

Whether an order of the Florida Public Service Commission dividing the retail service territories of two regulated electric utilities assigned Brevard County, Florida, to respondent Florida Power & Light Company.

PARTIES TO THE PROCEEDING AND RULE 29.6 LISTING

Petitioner Praxair, Inc., and respondents Florida Power & Light Company and Florida Power Corporation are the only parties to this action. The original plaintiff in this action was Union Carbide Corporation, a New York corporation. After Union Carbide filed this action, it created Praxair, Inc., by spinning off some of its assets. The district court subsequently entered an order substituting Praxair for Union Carbide as the party plaintiff.

The parent company of respondent Florida Power & Light Company is FPL Group, Inc. Florida Power & Light Company's subsidiaries, other than wholly-owned subsidiaries, are FPL Services, JEA 500 KV Transmission Line, Robert W. Scherer Electric Generating Plant — Unit #4, and St. Johns River Power Park.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING AND RULE 29.6 LISTING ii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 1

STATEMENT 2

REASONS FOR DENYING THE WRIT 7

CONCLUSION 14

TABLE OF AUTHORITIES

Page

Cases

324 Liquor Corp. v. Duffy, 479 U.S. 335 (1987) 8
Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328 (1990) 12
California Aviation, Inc. v. City of Santa Monica, 806 F.2d 905 (9th Cir. 1986) 12
California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97 (1980) . . . 4, 6
Columbia Steel Casting Co. v. Portland General Electric Co., 60 F.3d 1390 (9th Cir. 1995) 9, 10, 12
DFW Metropolitan Line Services v. Southwestern Bell Telephone Corp., 988 F.2d 601 (5th Cir.), *cert. denied*, 114 S. Ct. 183 (1993) 11, 12
Gulf Power Co. v. FPSC, 480 So. 2d 97 (Fla. 1985) 13
Lorrie's Travel & Tours, Inc. v. SFO Airporter, Inc., 753 F.2d 790 (9th Cir. 1985) 12
Mercy-Peninsula Ambulance, Inc. v. County of San Mateo, 791 F.2d 755 (9th Cir. 1986) 12
Municipal Utilities Board of Albertville v. Alabama Power Co., 21 F.3d 384 (11th Cir. 1994), *cert. denied*, 115 S. Ct. 1096 (1995) 11, 12
O'Brien v. Skinner, 414 U.S. 524 (1974) 8
PW Ventures, Inc. v. Nichols, 533 So. 2d 218 (Fla. 1988) 13, 14
Peoples Gas Sys., Inc. v. Mason, 187 So. 2d 335 (Fla. 1966) 5

Stinson v. United States, 508 U.S. 36 (1993) 7
Storey v. Mayo, 217 So. 2d 304 (Fla. 1968),
cert. denied, 395 U.S. 909 (1969) 5
Udall v. Tallman, 380 U.S. 1 (1965) 8
Washington v. Yakima Indian Nation,
439 U.S. 463 (1979) 12
Wisniewski v. United States, 353 U.S. 901 (1957) 12
*Yeager's Fuel, Inc. v. Pennsylvania Power &
Light Co.*, 22 F.3d 1260 (3d Cir. 1994) 8

Statutes & Rules

15 U.S.C. § 1 4
28 U.S.C. § 1254(1) 2
28 U.S.C. § 1292(b) 6
Fla. Stat. Ann. § 350.011 (West 1968) 2
Fla. Stat. Ann. § 366.04(2) (West 1996) 5
Fla. Stat. Ann. § 366.04(2)(e) (West 1996) 13
Fla. Stat. Ann. § 366.04(3) (West 1996) 5
Fla. Stat. Ann. § 366.04(5) (West 1996) 13
Fla. Stat. Ann. § 366.05(7) (West 1996) 5
Fla. Stat. Ann. § 366.05(8) (West 1996) 5
Eleventh Circuit Rule 35-6 2

Miscellaneous

Phillip E. Areeda & Herbert Hovenkamp,
Antitrust Law ¶ 212.4c (1995 Supp.) 12

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BRIEF FOR RESPONDENT FLORIDA POWER & LIGHT COMPANY IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-9a) is reported at 64 F.3d 609. The district court's opinion and order denying the parties' cross-motions for summary judgment (Pet. App. 10a-28a), and its opinion and order denying the parties' cross-motions for reconsideration (Pet. App. 31a-33a), are unreported.

JURISDICTION

The court of appeals entered its judgment on September 19, 1995. The court of appeals denied a suggestion of

rehearing *en banc* on December 15, 1995. Pet. App. 29a-30a. Pursuant to Eleventh Circuit Rule 35-6, a suggestion of rehearing *en banc* is also treated as a petition for rehearing before the original panel. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATEMENT

1. Respondents Florida Power & Light Company ("FPL") and Florida Power Corporation ("FPC") are regulated electric utilities engaged in the generation, distribution, and sale of electricity in different parts of Florida. This case concerns the interpretation of a 1965 order of the Florida Public Service Commission ("FPSC" or "Commission").[1] The FPSC's Order No. 3799, issued in 1965, expressly approved a division of retail service areas between FPL and FPC. Both the FPSC and the court of appeals below determined that Order No. 3799 allocated Brevard County to FPL's service area, whereas petitioner argues that it did not.

The purpose of Order No. 3799 "was to avoid duplication of service in areas of the state where there was significant population growth and where the utilities' service areas were converging." Pet. App. 5a. The Commission concluded that "unrestrained competition in those areas would be inefficient and uneconomical both for the utilities and [their] customers." *Id.* at 6a.

Order No. 3799 approved a division of service areas as shown by a red line drawn on a composite map. The red line "commenced at the northwestern corner of Volusia County . . ., meandered eastward between Volusia and Seminole Counties, and continued southward along the border

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[1] The FPSC formerly was known as the Florida Public Utilities Commission. See Fla. Stat. Ann. § 350.011 (West 1968). For convenience, it is referred to by its current name throughout this brief.

between Orange, Osceola and Brevard Counties. The line terminated at the southernmost point of Brevard County." Pet. App. 6a. The composite map comprised highway maps of Volusia, Seminole, Orange, and Osceola Counties. Although "[n]o map was submitted specifically for Brevard County," "Brevard County was shown on both maps," and the red boundary line "ran along the entire Brevard County line." *Id.* at 6a.

Prior to issuing Order No. 3799, the FPSC held a public hearing, at which witnesses testified that areas to the east of the red boundary line were to be served by FPL, while areas to the west of the line were to be served by FPC. Pet. App. 6a, 13a. The witnesses explained that the boundary line was needed because the two systems were growing together in Volusia and Seminole Counties, and "to a lesser, but nevertheless important degree," in the Orange-Brevard and Osceola-Brevard areas. *Id.* at 7a, 13a. The witnesses testified that the boundary line had not been extended further to the north or south because there was no prospect of competition between FPL and FPC in those areas. *Id.* at 13a.

FPL was already serving Brevard County, including the town of Mims, when the Commission issued Order No. 3799 in 1965. In the 30 years that have followed, the Commission and respondents consistently "have treated Mims as part of Florida Power & Light's service territory." Pet. App. 8a. During the 1980s, the Commission conducted a comprehensive review of approved territorial agreements that placed Brevard County within FPL's service area. *Id.*

2. Petitioner Praxair, Inc., operates an industrial gas plant in the town of Mims. FPL has supplied electricity to Praxair's plant since it opened in 1965. In 1987, Praxair became dissatisfied with the rates it was paying for electricity, and sought to obtain a special reduced rate from FPL. FPL asked the FPSC to approve a special rate for Praxair, but the

FPSC denied the request in April 1988, on the ground that a special rate would effectively require FPL's other customers to subsidize service to Praxair. Pet. App. 2a-3a, 15a.

In August 1988, Praxair asked FPC to sell it electricity, and asked FPL to "wheel" (*i.e.*, transmit) the electricity across FPL's power lines to Praxair's plant. FPL and FPC independently declined to comply with this request, on the ground that it would violate Order No. 3799. Pet. App. 15a.

FPL promptly asked the Commission to decide whether compliance with Praxair's request would violate Order No. 3799. In February 1989, the Commission issued a declaratory statement that compliance with Praxair's request would violate Order No. 3799. Pet. App. 7a, 16a.

Praxair filed this action in October 1988, alleging that respondents had violated Section 1 of the Sherman Act, 15 U.S.C. § 1, by entering into an agreement to divide service territories. Respondents moved for summary judgment on the ground that their conduct, pursuant to Order No. 3799, was protected under the state-action doctrine. The FPSC filed a brief as *amicus curiae* in support of respondents. Praxair also moved for summary judgment on the state-action issue.

3. The district court (M.D. Fla., Nimmons, J.) denied the cross-motions for summary judgment. Pet. App. 10a-28a. The court noted that private conduct is immune from antitrust attack if (1) "the challenged restraint on competition is one 'clearly articulated and affirmatively expressed as state policy' and (2) . . . 'the policy [is] actively supervised by the State itself.'" Pet. App. 17a (quoting *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980)). The district court held that Order No. 3799 satisfies both prongs of the *Midcal* test.

The court held that the "clear articulation" requirement is satisfied because Florida "has demonstrated its intent to

displace competition in the field of retail electric service with a regulatory mechanism to designate territorial boundaries." Pet. App. 20a. Florida statutes grant the FPSC broad authority to review and approve territorial agreements, and to resolve territorial disputes on its own motion or in response to a petition by a utility. Pet. App. 18a-19a (citing Fla. Stat. Ann. §§ 366.04(2), 366.04(3), 366.05(7)-(8) (West 1996)). The Florida Supreme Court has interpreted these statutes as authorizing the FPSC to exercise "comprehensive control over competition among retail utility service providers." Pet. App. 19a (citing *Storey v. Mayo*, 217 So. 2d 304, 307 (Fla. 1968), *cert. denied* 395 U.S. 909 (1969)). And the FPSC "has stated on many occasions that its supervision of territorial agreements among utilities is intended to eliminate the harmful effects of unrestrained competition . . . ." Pet. App. 19a.

The court held that the "active supervision" requirement is satisfied because the FPSC exercises "extensive control over the validity and effect" of agreements dividing service territories. Pet. App. 27a. The Commission held a public hearing on respondents' application for a territorial division, "at which witnesses testified and the public participated." Pet. App. 26a. Following the hearing, the Commission approved the application by written order that expressly maintained continuing jurisdiction over modifications to the order. *Id.*

The district court nevertheless denied summary judgment on the state-action issue. The court relied on a statement in a subsequently-reversed order of the Commission for the proposition that territorial boundary lines "allocat[e] territory in areas where competition between utilities is expected." Pet. App. 23a (quoting FPSC Order No. 3835 (June 24, 1965), *reversed, Peoples Gas Sys., Inc. v. Mason*, 187 So. 2d 335, 337 (Fla. 1966)). The district court concluded that Order No. 3799 was not dispositive because there was a disputed issue of material fact as to "whether Mims was located in an area to the east of the boundary line in which competition between

FPL and FPC was reasonably foreseeable in the future." Pet. App. 24a. Accordingly, the district court denied the motions for summary judgment.

Both petitioner and respondents sought reconsideration. The district court denied the motions for reconsideration in a brief order. Pet. App. 31a-33a. Petitioner and respondents both appealed; the FPSC and the Attorney General of Florida filed briefs as *amici curiae* in support of respondents.

4. A unanimous panel of the court of appeals (Cox, *Roney*, and Wood) reversed.[2] The court of appeals agreed with the district court that both prongs of the *Midcal* test are satisfied in this case. Florida "has effectively displaced competition between electric utilities in the retail market," and has "'a clearly articulated and affirmatively expressed state policy' to regulate retail electric service areas." Pet. App. 4a (quoting *id.* at 18a). In addition, "'the Commission's extensive control over the validity and effect of [territorial] agreements negates any inference that the privately initiated agreements lack state supervision.'" Pet. App. 4a (quoting *id.* at 27a).

The court of appeals held that the district court had erred in concluding that there is a disputed question of material fact as to whether Mims is covered by Order No. 3799. In so holding, the court focused on "two factual inquiries": (1) "events surrounding the Commission's approval of the territorial agreements that resulted in Order No. 3799 in 1965," and (2) "the parties' actions since the 1965 order, which culminated in the Commission's 1989 declaratory statement interpreting that order." Pet. App. 5a.

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[2] The court of appeals asserted jurisdiction both by reason of the district court's certification pursuant to 28 U.S.C. § 1292(b) and by reason of the collateral-order doctrine. See Pet. App. 2a.

As to the first inquiry, the court concluded that "[a] logical interpretation" of Order No. 3799 "is that Brevard County was included," because the Order established "a two-sided, east-west division." Pet. App. 7a. The court concluded that this interpretation is "confirm[ed]" by testimony at the public hearing that "the area east of the boundary, which encompassed only Brevard County, belonged to FPL." Pet. App. 7a-8a.

As to the second inquiry, the court observed that "[a]n agency's interpretation of its own regulations must be given controlling weight unless that interpretation is plainly erroneous or inconsistent with the regulation." Pet. App 8a (citing *Stinson v. United States*, 508 U.S. 36, 45 (1993)). The court of appeals noted that for 30 years the FPSC has treated Mims as part of FPL's service territory. The FPSC included Brevard County within FPL's service area in a comprehensive review of approved territorial agreements in the 1980s. And in its 1989 declaratory statement, the Commission "reasonably interpreted the prior agreement to allocate Brevard County to Florida Power & Light." Pet. App. 8a.

REASONS FOR DENYING THE WRIT

1. Petitioner misreads the court of appeals' decision and, as a result, frames a question that is not presented by this case. Petitioner asserts that the court of appeals held that "a state agency may retroactively confer antitrust immunity under the state action doctrine upon past private anticompetitive conduct." Pet. i. The court of appeals held no such thing. Instead, that court held that respondents' conduct was immunized by Order No. 3799, which was issued many years prior to the conduct at issue in this case. The court of appeals went on to observe that its interpretation of Order No. 3799 is confirmed by the Commission's interpretation of its own Order over a period of 30 years. The court of appeals

certainly did not hold that respondents' conduct was retroactively immunized by the Commission.

In interpreting Order No. 3799, the court of appeals first looked to the text of the Order and concluded that "[a] logical" and "entirely plausible and reasonable" interpretation is that the Order assigns Brevard County to FPL's service area. Pet. App. 7a. The court of appeals added that this interpretation is "confirm[ed]" by testimony during the public hearings on Order No. 3799. *Id.* at 8a. The court thus indicated that the text of the Order and the record of the public hearing are sufficient to decide this case.

As an additional basis for its holding, the court of appeals applied the settled principle that an "agency's interpretation of its own regulations must be given controlling weight unless that interpretation is plainly erroneous." Pet. App. 8a. See *Udall v. Tallman*, 380 U.S. 1 (1965); *Yeager's Fuel, Inc. v. Pennsylvania Power & Light Co.*, 22 F.3d 1260, 1268 (3d Cir. 1994); *cf. 324 Liquor Corp. v. Duffy*, 479 U.S. 335, 344 n.6 (1987) (quoting *O'Brien v. Skinner*, 414 U.S. 524, 531 (1974) (A federal court in applying the state-action doctrine may not "construe a state statute contrary to the construction given it by the highest court of a State.")). Applying this principle, the court of appeals concluded that the Commission's consistent practice, over a period of more than 30 years, of interpreting its own Order to include Brevard County, further supports respondents' interpretation of the Order. Pet. App. 8a. Petitioner is thus incorrect in asserting (Pet. 13) that the court of appeals concluded that "judgment could not be granted to the utilities based upon" Order No. 3799. Pet. 13. The court of appeals relied on the Commission's post-1965 actions as aids to *interpretation* of Order No. 3799, not as freestanding grants of retroactive antitrust immunity. See Pet. App. 8a (1989 declaratory statement "specifically found" that FPL "could not wheel power to Praxair *because it would be in contravention of the*

approved territorial agreement"); *id.* (1989 declaratory statement "*reasonably interpreted the prior agreement* to allocate Brevard County to Florida Power & Light") (emphasis added).[3]

In short, the court of appeals did not conclude that the Commission had conferred retroactive antitrust immunity; instead, it simply cited in support of its conclusion the agency's reasonable interpretation of its own prospective order. The court of appeals conclusion that Order No. 3799 assigns Brevard County to FPL's service area is correct. In any event, that factbound question plainly merits no further review.

2. There is manifestly no conflict between the decision in this case and the decision in *Columbia Steel Casting Co. v. Portland General Electric Co.*, 60 F.3d 1390 (9th Cir. 1995). In *Columbia Steel*, the court of appeals held that a 1972 order of the Oregon Public Utility Commission ("PUC") approved exclusive service areas, and thus conferred state-action immunity on the conduct at issue, even though the PUC's order on its face approved only a one-time exchange of

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[3] Petitioner acknowledges (Pet. 2) that it does not dispute any of the material facts in this case, but invokes the principle that all reasonable inferences from those facts should have been drawn in its favor on summary judgment. See also *id.* at 10 n.5. The court of appeals' opinion does not indicate that it refused to draw reasonable inferences in petitioner's favor. In any event, the interpretation of Order No. 3799 is an issue of (state) law that can appropriately be decided on summary judgment. Indeed, petitioner has recognized throughout this litigation that the state-action issue was appropriately resolved, one way or the other, on summary judgment. See Pet. 7 (agreeing that "issue should be decided based upon available documentary evidence"); Pet. C.A. Opening Br. 13 ("No jury demand has ever been made in this case, and there is no need for a trial to determine what was submitted to the Commission and approved in 1965. . . . The *only* thing needed to resolve this case is to review the paper record . . ..") (emphasis in original).

customers and properties. The court of appeals acknowledged that the PUC's order "never uses the term 'exclusive territory,'" does not refer to the relevant provisions of state law, and may have been "intentionally made ambiguous" to deflect opposition to a division of service areas. *Id.* at 1396-97, 1398. The court of appeals nevertheless applied a "liberal 'foreseeability' standard" and concluded that the creation of exclusive service areas was a foreseeable result of the state agency's order. *Id.* at 1396. The court reasoned that the order "was desirable largely because it eliminated the need for duplicate poles, lines and other facilities in each territory," and this benefit would be lost if the order were not interpreted as creating exclusive service areas. *Id.* at 1397.

This brief description is sufficient to show that *Columbia Steel* does not conflict with the decision in this case. *Columbia Steel* was a considerably *closer* case on the state-action issue, and yet the Ninth Circuit decided in favor of the utilities. Petitioner's assertion of a conflict is based entirely on a footnote in the Ninth Circuit's opinion, which declined to consider "the PUC's retroactive amendment of its 1972 Order in 1992" in interpreting the 1972 Order. See Pet. 11, 12-13, 15 (citing 60 F.3d at 1398 n.7); see also 60 F.3d at 1394 (In 1992, PUC "amended its 1972 Order, *nunc pro tunc*."). Because the FPSC did not purport to amend Order No. 3799 retroactively, the Ninth Circuit's refusal to consider the Oregon PUC's retroactive amendment cannot possibly be viewed as creating a conflict in the circuits.[4]

Petitioner also misreads two other cases that it cites as examples of decisions allowing States to confer retroactive

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[4] Elsewhere in its opinion, the Ninth Circuit expressly reserved decision on the utility's other arguments concerning the legal effect of the PUC's 1992 order, "[b]ecause we reverse on the basis of our reading of the 1972 Order." 60 F.3d at 1397 n.5.

immunity for private conduct. The first case, *Municipal Utilities Board of Albertville v. Alabama Power Co.*, 21 F.3d 384 (11th Cir. 1994), *cert. denied*, 115 S. Ct. 1096 (1995), did not address retrospective antitrust immunity at all. Instead, it held that there can be no *prospective* immunity for unsupervised conduct. In *Municipal Utilities Board*, the Alabama legislature enacted two statutes incorporating territorial agreements between two suppliers of electricity. There was no suggestion that the utilities enjoyed antitrust immunity for conduct undertaken prior to enactment of the statutes. Instead, the issue before the court was whether the agreements failed to qualify for state-action immunity because the statutes gave the utilities unsupervised power to allocate new customers among themselves. The court interpreted the statutes to require that "the Alabama Legislature must explicitly approve any customer allocations the parties might wish to make," and held that this interpretation was necessary to confer state-action immunity. *Id.* at 387.

In *DFW Metro Line Services v. Southwestern Bell Telephone Corp.*, 988 F.2d 601 (5th Cir.), *cert. denied*, 114 S. Ct. 183 (1993), the court of appeals, in concluding that the state agency had actively supervised the conduct at issue, noted that "while this suit was pending, the PUC was adjudicating the *very same issues presented in the instant case*." *Id.* at 606-07 (emphasis in original). The court concluded that "[i]t is ludicrous, almost to the point of frivolity, for Metro to contend that the PUC does not actively supervise the conduct in question given the fact that Metro and Bell are awaiting a PUC decision on Bell's actions 'as we speak.'" *Id.* at 607. The court of appeals' reliance on a pending state agency proceeding as evidence of continuing active supervision is a far cry from a holding that state agencies may confer retroactive antitrust immunity.

In sum, petitioner's discussion of a "different model of the state action doctrine" (Pet. 16) is a straw man based on a

misreading of *Municipal Utilities Board, DFW Metro Line Services*, and the decision in this case. Accordingly, further review is not warranted.[5]

3. The court of appeals' decision is correct for an additional reason not reached by the court below. See *Washington v. Yakima Indian Nation*, 439 U.S. 463, 476 n.20 (1979) (prevailing party may defend judgment on any ground properly raised below). As FPL argued below (see FPL C.A. Br. as Cross-Appellee 36-40), Florida law would have prohibited FPC from serving Praxair even in the absence of an approved territorial agreement. Consequently, respondents could not show any antitrust injury. See *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 344 (1990) (describing antitrust injury requirement).

Florida's regulatory policy prohibits retail competition between utilities irrespective of any territorial agreement. The Commission is authorized to resolve, on its own motion if necessary, "any territorial dispute involving service areas," and is directed to exercise its regulatory powers to avoid

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[5] In *California Aviation, Inc. v. City of Santa Monica*, 806 F.2d 905, 909 (9th Cir. 1986), the Ninth Circuit held that the California legislature conferred state-action immunity on conduct that occurred 16 years prior to enactment of the legislation, by recognizing and affirming a pre-existing state policy. The Ninth Circuit reached similar results in *Mercy-Peninsula Ambulance, Inc. v. County of San Mateo*, 791 F.2d 755, 757 n.1, 758 n.2 (9th Cir. 1986), and *Lorrie's Travel & Tours, Inc. v. SFO Airporter, Inc.*, 753 F.2d 790. 793 (9th Cir. 1985). These decisions need not be viewed as conflicting with the Ninth Circuit's *Columbia Steel* decision. See Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 212.4c, at 192 (1995 Supp.) ("statute that purports to 'clarify' and endorses an authorization reasonably implicit in pre-existing statutes or court decisions may help support a finding that the challenged conduct was authorized when it occurred"). To the extent that the decisions of the Ninth Circuit are in tension, however, that intra-circuit tension does not warrant the attention of this Court. See *Wisniewski v. United States*, 353 U.S. 901 (1957).

"uneconomic duplication of generation, transmission, and distribution facilities." Fla. Stat. Ann. § 366.04(2)(e), (5) (West 1996). The FPSC consistently has exercised its authority to prohibit utilities from serving potential customers located in an area served by another utility, even where no territorial agreement barred such service.[6] As the Commission explained in its brief filed in the court of appeals:

> If Praxair were to prevail in this action, the court either would have to order FPC to construct duplicative distribution lines to the Mims plant, or order FPL to wheel FPC's power to the plant through FPL's distribution system. Neither remedy is available under Florida law. The State of Florida does not permit "uneconomic duplication of facilities." . . . The system of electric service territories is specifically designed to prevent that problem. Nor does the State permit retail wheeling. . . . Both remedies invite rate shopping throughout the State and would cause disruption, discrimination, and inefficiencies in the electric utility industry in Florida.

FPSC C.A. Br. 20 (citations omitted).

The Florida Supreme Court addressed an analogous situation in *PW Ventures, Inc. v. Nichols*, 533 So. 2d 218 (Fla. 1988), where a cogeneration facility sought to serve a major customer already served by FPL. The court ruled that the cogenerator's proposal "to go into an area served by a utility and take one of its major customers" (*id.* at 283) was prohibited by Florida law. The court observed that if state law permitted "cherry picking" of large industrial customers, the lost revenue "would have to be made up by the remaining

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[6] See, *e.g.*, FPSC Order No. 13668 (1994), *aff'd*, *Gulf Power Co. v. FPSC*, 480 So. 2d 97 (Fla. 1985); Order No. 16106 (1986); Order No. 12324 (1983).

customers of the regulated utilities since the fixed costs of the regulated systems would not have been reduced." *Id.*

Accordingly, petitioner would have suffered no antitrust injury even if Order No. 3799 had not allocated Brevard County to FPL.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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